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Suraina bt Adenan v Public Prosecutor

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HIGH COURT (MIRI) — CASE NO MYY-42A AC-1/6 OF 2013
STEPHEN CHUNG J
7 FEBRUARY 2014

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Criminal Procedure — Sentence — Excessive sentence — Government servant and first offender sentenced to consecutive term of five years' jail on each of three charges of criminal breach of trust ('CBT') — Whether total of 15 years' jail manifestly excessive as maximum jail term for CBT under s 409 of the Penal Code was 20 years — Whether two years' jail on each charge fair and reasonable based on facts and circumstances of case

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The appellant, who was employed as an assistant administrator (finance) in the Immigration Department, was found guilty by a lower court of three charges of criminal breach of trust ('CBT') over monies that were entrusted to her. The monies, totalling RM41,130, was revenue received by her department at Miri on three occasions. The appellant was sentenced to five years jail on each

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charge, the sentences to run consecutively. In her instant appeal against conviction and sentence, the appellant contended that the charges against her were defective and that she was wrongly blamed for the offences as substantially larger sums of money had been reported missing from the department and the people who had taken those monies must have also misappropriated the

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monies mentioned in the charges against her.

Held, affirming the convictions but reducing the jail sentence on each charge to two years:

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(1) The appeal record showed that on the three dates stated in the charges, the appellant had received and been entrusted with the said three sums of monies in her capacity as a public servant. The evidence showed she did not bank-in those monies into the designated account of the department and had misappropriated the funds. Section 409B of the Penal Code

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presumed that she had acted dishonestly until the contrary was proven. Based on the appeal record, the prosecution had established each of the essential ingredients of the charges against the appellant and the trial judge was correct to rule that a prima facie case had been made out (see paras 22–23).

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(2) The appellant failed to raise any reasonable doubt on the prosecution's case and there was no merit in the appeal against her conviction on the three charges (see paras 24–25).

(3) Although the three offences were committed close to each other, they were on different dates and were different transactions. On the facts and circumstances, the trial judge was correct to impose the consecutive sentences but notwithstanding the seriousness of the offences, the aggregate sentence of 15 years was manifestly excessive. The appellant was a first offender and the total sum in question was only RM41,130. Taking into account public interest, the gravity of the offence and s 409 of the Penal Code (which imposed a jail term of not less than two years and not more than 20 years plus whipping and a fine), a more fair, reasonable and suitable sentence in the instant case was a total of six years jail only instead of 15 years. Pursuant to s 289 of the Criminal Procedure Code, no whipping was imposed on the appellant (see paras 26–28).

[Bahasa Malaysia summary

Perayu, yang bekerja sebagai pembantu tadbir (kewangan) di Jabatan Imigresen, telah didapati bersalah oleh mahkamah bawahan atas tiga pertuduhan jenayah pecah amanah ('JPA') untuk wang yang diamanahkan kepadanya. Wang tersebut, berjumlah RM41,130, merupakan hasil yang diterima oleh jabatannya di Miri sebanyak tiga kali. Perayu telah dihukum penjara selama lima tahun untuk setiap pertuduhan, hukuman yang berjalan secara berturutan. Dalam rayuannya ini terhadap sabitan dan hukuman, perayu berhujah bahawa pertuduhan terhadapnya adalah cacat dan bahawa dia telah salah dipersalahkan untuk kesalahan-kesalahan itu kerana sejumlah besar wang itu telah dilaporkan hilang dari jabatan itu dan orang yang telah mengambil wang itu hendaklah telah menyalahgunakan wang yang disebut dalam pertuduhan-pertuduhan terhadapnya.

Diputuskan, mengesahkan sabitan-sabitan tetapi mengurangkan hukuman penjara untuk setiap pertuduhan kepada dua tahun:

(1) Rekod rayuan menunjukkan bahawa pada tiga tarikh yang dinyatakan dalam pertuduhan-pertuduhan itu, perayu telah menerima dan diamanahkan dengan tiga jumlah wang tersebut dalam kapasitinya sebagai penjawat awam. Keterangan menunjukkan dia tidak memasukkan wang ke dalam akaun bank jabatan yang ditetapkan dan telah menyalahgunakan dana itu. Seksyen 409B Kanun Keseksaan menganggap bahawa dia telah bertindak secara tidak jujur sehingga yang

sebaliknya dibuktikan. Berdasarkan rekod rayuan itu, pendakwaan telah membuktikan setiap elemen penting pertuduhan-pertuduhan terhadap perayu dan hakim perbicaraan dengan wajar telah memutuskan bahawa terdapat kes prima facie yang dibuat (lihat perenggan 22–23).

(2) Perayu telah gagal menimbulkan apa-apa keraguan munasabah atas kes pendakwaan dan tiada merit dalam rayuan terhadap sabitannya atas ketiga-tiga pertuduhan itu (lihat perenggan 24–25).

(3) Walaupun ketiga-tiga kesalahan itu dilakukan dalam tempoh yang dekat antara satu sama lain, ketiga-tiganya berlaku pada tarikh dan transaksi berbeza. Berdasarkan fakta dan keadaan, hakim perbicaraan dengan wajar menjatuhkan hukuman secara turutan tetapi meskipun begitu keseriusan kesalahan-kesalahan itu, agregat hukuman 15 tahun adalah jelas berlebihan. Perayu adalah pesalah pertama dan keseluruhan jumlah yang dipersoalkan itu hanyalah RM41,130. Dengan mengambil kira kepentingan awam, keseriusan kesalahan dan s 409 Kanun Keseksaan (yang mengenakan tempoh penjara tidak kurang daripada dua tahun dan tidak lebih daripada 20 tahun beserta sebatan dan denda), satu hukuman yang lebih adil, munasabah dan sesuai dalam kes ini adalah tempoh penjara selama enam tahun sahaja dan bukan 15 tahun. Menurut s 289 Kanun Tatacara Jenayah, tiada sebatan dikenakan ke atas perayu (lihat perenggan 26–28).]

Notes

For cases on excessive sentence, see 5 *Mallal's Digest* (5th Ed, 2015) paras 4495–4521.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)

PP v LKI Holidays Leisure Sdn Bhd [1998] 1 MLJ 315, HC (refd)

PP v Prabu a/l Veeramuthu and Others [2010] MLJU 663; [2010] 8 CLJ 257, CA (refd)

Legislation referred to

Criminal Procedure Code s 289

Penal Code ss 21(i), 405, 409, 409B

Arthur Lee (Firdaus Morshidi with him) (Arthur Lee, Lin & Co) for the appellant.

Mohd Syakil bin Zulkifli (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Stephen Chung J:

RULING

[1] In this appeal, there are three charges against the appellant under s 409 of the Penal Code. After a full trial, the trial judge found the appellant guilty and convicted her of all the three charges. The trial judge sentenced the appellant to five years imprisonment for each charge, the sentences to run consecutively.

[2] The appellant, being dissatisfied with the convictions and sentences of the trial judge given on 14 May 2013, appealed to this court against the convictions and sentences.

[3] In the first charge, the appellant was alleged to have committed criminal breach of trust of the sum of RM14,560. In the second charge she was alleged to have committed criminal breach of trust of the sum of RM19,555. In the third charge she was alleged to have committed criminal breach of trust of the sum of RM7,015.

[4] The brief facts were as follows. The appellant was employed as a *Pembantu Tadbir* (*Kewangan) Gred W17* with the Jabatan Imigresen Malaysia. At all material times she was working at the *Pejabat Imigresen*, second and third Floors, Yu Lan Plaza, Jalan Brooke, Miri. On 20 May 2011, the appellant in the course of her employment received a sum of RM14,560 being the revenues collected for that day by the department. On 26 May 2011, the appellant similarly received a sum of RM 19,555 being the revenue collected for that morning. On 31 May 2011, the appellant again received a sum of RM7,015 being part of the revenues collected for that day.

[5] The prosecution submitted that the appellant had committed criminal breach of trust in respect of each of those sums which were handed to and received by her for her safe custody to be dealt with in accordance to the rules and office procedures.

[6] Section 405 of the Penal Code provides, inter alia, that whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, or dishonestly disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, commits criminal breach of trust. Section 409 of the Penal Code provides that whoever, being in any manner entrusted with property, in his capacity of a public servant or an agent, commits criminal breach of trust in

respect of that property, shall be punished. In this appeal, illustration (e) of s 405 is applicable.

[7] The first issue of this appeal is whether the appellant was an assistant administrator (Finance) Grade W17 in the Immigration Department, Miri. This issue was raised in grounds 2.2, 2.3, 2.4, 2.28 and 2.29 of the petition of appeal and to be dealt with together.

[8] The appellant submitted that the letter from the Malaysian Public Service Commission marked as exh P1(B) was not admissible in evidence, hearsay and that no weight should be attached to it because the maker of P1(B) was not called as a witness to establish that the appellant was appointed as an assistant administrator (Finance) Grade W17 in the Immigration Department of Malaysia, at Miri.

[9] The appellant submitted that the words 'employee or agent of the Government of Malaysia' were not stated in the three charges and the appellant was prejudiced and misled by the defective charges, referring to the case of *Public Prosecutor v LKI Holidays Leisure Sdn Bhd* [1998] 1 MLJ 315 in support of her submissions.

[10] I have read the judgment of the trial judge. The evidence showed that the appellant had since 23 November 2004 been employed as a *Pembantu Tadbir (Kewangan) Gred W17* at the Immigration Department, Miri. Her duties were set out in exh P2. Since then she had been performing and paid her remuneration in such capacity and there was no complaint that she was not working or not performing or not paid or never appointed as such.

[11] Section 21(i) of the Penal Code defines a public servant as every officer whose duty it is, as such officer, to take, receive, keep or expend property on behalf of the government and in the service or pay of the government. Explanation 1 of this section provides that persons falling under any of the above descriptions are public servants, whether appointed by the government or not and explanation 2 provides that wherever the words 'public servant' occur, they shall be understood of every persons who is in actual possession of the situation of a public servant, *whatever defect those may be in his right* to hold that situation. (Emphasis added.) On the facts and circumstances of this case, there are no merits on these grounds of appeal that the prosecution had failed to prove that she was employed as such.

[12] In grounds 2.5 and 2.6 of the petition of appeal, the appellant submitted that the prosecution failed to account for the balance of the missing sums. The appellant submitted that more than one million Ringgit Malaysia was reported unaccounted for and which was subsequently revised to more

than RM700,000 only. The appellant submitted that other persons had access to the monies kept in the office who had misappropriated the said sums instead of the appellant.

[13] The appellant referred to PW2's testimony that he received information from the Ministry's auditor Puan Zahara which caused him to lodge the police report (P3) that a sum of RM1,079,442.50 was not banked into the office's account and he suspected that it had been misappropriated.

[14] The appellant referred to PW2's testimony that no 'Penyata Pemungut' was prepared for the takings, bank drafts and cash collected for the dates on 13, 20, 23, 26, 30–31 May 2011 and on 3, 6–10 and 16 June, 2011. PW2 said that based on the audits more than RM700,000 was unaccounted for.

[15] The appellant submitted that it was incumbent on the prosecution to explain what happened to the missing monies on those dates for which the appellant was not charged with. It was submitted that other persons who misappropriated the monies on those dates were likely to have done so on the 20, 26 and 31 May 2011 respectively but had put the blame on the appellant.

[16] Although the audits indicated that more than RM700,000 was unaccounted for on those dates, there was no allegation that the appellant had misappropriated the said sums of more than RM700,000 on those dates. In any event the appellant was not charged for misappropriating more than RM700,000 on those dates. The crux of this appeal is on 20 May 2011, 26 May 2011 and 31 May 2011 whether the appellant was entrusted with and had misappropriated the sums of RM14,560, RM19,555 and RM7,015 respectively.

[17] Therefore the appellant referred to grounds 2.7, 2.8, 2.9, 2.10, 2.13, 2.14, 2.15, 2.16, 2.17, 2.18, 2.19 and 2.22 of the petition of appeal that the procedures of the Immigration Department were not followed by its officers and employees, that the appellant did not have exclusive access and possession of the sums which she was alleged to have misappropriated.

[18] The appellant submitted that there were five finance clerks in the Immigration Department at Miri and that these including the appellant were on duty on those dates stated in the three charges. It was submitted the cause of the unaccounted monies was due to lack of supervision and internal controls and that the procedures were never followed by the staff and officers in the department. The appellant submitted that she was not responsible for the three sums which she was alleged to have misappropriated.

[19] The appeal record showed that on 20 May 2011 PW6 collected

A revenues amounting to RM 14,560 and handed the said sum to the appellant as the receiving clerk on duty on that day. On 26 May 2011, PW7 collected revenues amounting RM 19,555 in the first session (morning) and RM 11,005 in the second session (afternoon). PW7 testified that he handed over those two sums to the appellant including the sum of RM 19,555. Which was the subject B matter of the second charge preferred against the appellant. On 31 May 2011, PW8 assisted PW6 to collect revenues at the counter. Since he did not have any ID card to use the machine, the appellant keyed in her ID to enable PW8 to use the machine at the counter to collect revenues on that day. PW8 testified that he collected RM7,015 and handed over the said sum to the appellant. This sum C was part of the total of RM31,610 received by the appellant, (see exhs P11 and P16).

[20] The record of appeal showed that PW5 testified that it was the appellant's duties to receive revenues collected by the cashiers, prepare the D '*penyata pemungut*' and hand the monies received including cheques, drafts, money or postal orders to the security firm engaged by the department to be paid into the account of the department at CIMB Bank.

E **[21]** Based on the testimony of PW2 and PW4 respectively, the appellant did not prepare the '*penyata pemungut*' for those three sums which she had received on those dates. Based on the audit reports prepared by PW4, the appellant did not pay or bank in these three sums which she had received from the cashiers ie PW6, PW7 and PW8 respectively contrary to her scope of duties and in F violation of her job instructions.

[22] The appeal record showed that on those dates ie 20 May 2011, 26 May 2011 and 31 May 2011, the appellant had received and had been entrusted with those three sums in her capacity as a public servant. The evidence showed G that she did not bank in these three sums into the designated account of the department at CIMB Bank and had misappropriated the said sums. Section 409B of the Penal Code presumes that she had acted dishonestly until the contrary is proved.

H **[23]** I have read the record of appeal and the judgment of the trial judge. Based on the record of appeal the prosecution had established each of the essential ingredients of the charges made against the appellant. The trial judge was correct to rule that the prosecution had made out the prima facie case against the appellant.

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[24] I have read the testimony and the defence of the appellant in the record of appeal. She testified that on those dates she had handed over the moneys which she had received to Alfadha bin Sapiee who was an employee of the security firm, to bank in those sums at CIMB Bank. The appellant referred to

exh Dl and D2 in support of her testimony. However, these documents were in respect of the date of 25 May 2011. The appellant did not produce any similar documents for the dates on 20 May 2011, 26 May 2011 and 31 May 2011 that she had handed over these sums to Alfadha bin Safiee to be paid into the said account. Based on the record of appeal, the appellant did not raise any reasonable doubt that she had handed over these sums to be banked in and that she did not misappropriate these sums.

[25] For the reasons given, there are no merits in the appeal against her convictions in respect of each of those three charges made against her. Based on the totality of the evidence adduced, there is no reason to intervene the findings made by the trial judge to record the convictions against the appellant. Therefore the convictions are affirmed and the appeal in respect of the convictions is dismissed.

[26] In respect of the appeal against the sentences, although the three offences committed were close to each other, they were committed on each different date and were different transactions. Based on the facts and circumstances, the trial judge was correct to impose the consecutive sentences: see *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572, *Public Prosecutor v Prabu a/l Veeramuthu and Others* [2010] MLJU 663; [2010] 8 CLJ 257.

[27] Section 409 Penal Code prescribes that whoever commits criminal breach of trust shall be punished with imprisonment for a term which shall not be less than two years and not more than 20 years and with whipping, and shall also be liable to fine. The trial judge had imposed a total of 15 years on the appellant.

[28] On the facts and circumstances of the case, notwithstanding that these are serious offences, the aggregate sentence of 15 years was manifestly excessive. The appellant is a first offender. The total sums taken amounted to RM41,130 only. I have taken into consideration public interest, the gravity of the offence and the penalties imposed under s 409 of the Penal Code. On the facts and circumstances of this appeal, a more fair, reasonable and suitable sentence should be a total of six years only instead of fifteen years. Therefore I reduce the sentence imposed by the trial judge from five to two years in each of the three consecutive sentences. Pursuant to s 289 of the CPC no whipping shall be imposed on the appellant.

Convictions affirmed but jail sentence on each charge reduced to two years.

Reported by Ashok Kumar